OCBC BANK (MALAYSIA) BHD

v.

UNIMASCO SDN BHD & ORS

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL SUIT NO: 22-27-1998]
10 MAY 2004

CIVIL PROCEDURE: *Judgment and order - Setting aside - Four year delay - Order served on former solicitors - Whether valid service - Rules of High Court 1980, O. 42 r. 13*

CIVIL PROCEDURE: *Summary judgment - Setting aside - Whether judgment regular - Summons served on former solicitors - Whether valid service - Rules of High Court 1980, O. 62 r. 13 & O. 64 r. 1(1) - Whether defence has merit*

CIVIL PROCEDURE: *Stay of execution - Discretion of court - Whether special ground or special circumstances exist*

CONTRACT: *Guarantee - Guarantor - Action against guarantor - Whether plaintiff has duty to mitigate loss*

The plaintiff served a writ of summons and statement of claim on the 2nd defendant. The 2nd defendant through his former solicitors filed an appearance but did not file any statement of defence. The plaintiff later filed a summons in chambers for summary judgment against the 2nd defendant. The 2nd defendant did not file any affidavit in reply. On the day fixed for the hearing of the summary application, neither the 2nd defendant nor his solicitors were present. The summary judgment was entered. The sealed copy of the order was later sent to the 2nd defendant's former solicitors by AR registered post. Four years later, the 2nd defendant filed an application to set aside the summary judgment or alternatively, for stay of execution. The application was dismissed by the SAR. The 2nd defendant appealed. The grounds for the appeal are, *inter alia* (i) the non-receipt of the order by the 2nd defendant; (ii) the summary judgment was irregular as the service of the summons in chambers on the 2nd defendant's former solicitors was defective as there was no acknowledgement of receipt on the AR card and (iii) the 2nd defendant has merit in his defence *ie*, the claim for interest was wrongly computed and imposed and the plaintiff had failed to mitigate his loss.

Held (dismissing the appeal):

[1] The service of the order by AR post on the 2nd defendant's former solicitors on 28 October 1998 is effective service as the former solicitors were at all material time the solicitors on record for the second defendant and so constitutes 'the receipt of the order' by the 2nd defendant under O. 42 r. 13. (p 489 c)

[2] The summons in chambers has been duly served on the 2nd defendant's former solicitors and that such service constitutes receipt thereof by the 2nd defendant under O. 62 r 13 and O. 64 r 1(1). Therefore, in the circumstances, the summary judgment has been regularly obtained by the plaintiff against the 2nd defendant. (p 493 c-d)

[3] The issue of mitigation of loss does not arise in the instant case as the plaintiff's action against the 2nd defendant was founded on guarantee issued by the 2nd defendant to the plaintiff. (p 493 g)

[4] The certificate of indebtedness shall be accepted as final and conclusive as it was not disputed by the 2nd defendant. (p 494 f)

[5] In the instant appeal, there is no ground or circumstance whatsoever, less so any special ground or circumstances, in order for the court to exercise the discretion in favour of the 2nd defendant for stay of execution. (p 496 e)

[Appeal dismissed with costs.]

Case(s) referred to:

All persons in Occupation of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No 26977 for Lot 4271 in the Township Of Johore Bahru, Johor v Punca Klasik Sdn Bhd [1998] 5 CLJ 49 HC ***(refd)***

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 2 CLJ 1 SC ***(refd)***

Bank Bumiputra Malaysia Bhd v. Esah Abdul Ghani [1985] 2 CLJ 409; [1985] CLJ (Rep) 41 SC ***(refd)***

Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 HC ***(refd)***

Citibank NA v. Ooi Boon Leong & Ors [1981] 1 MLJ 282 ***(refd)***

Craig v. Kanssen [1943] 1 KB 256 ***(dist)***

Development & Commercial Bank Bhd v. Cheah Theam Swee [1989] 2 CLJ 809; [1989] 1 CLJ (Rep) 474 HC ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(refd)***

Ewart v. Latta [1865] 4 Macq 983 ***(refd)***

Fira Development Sdn Bhd v. Goldwin Sdn Bhd [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 SC ***(dist)***

Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd [1994] 1 CLJ 329 HC ***(dist)***

Ho Ming Chu v. Leong Shee Wah [2001] 1 LNS 311 ***(foll)***
Hong Leong Finance Bhd v. Hon Hoi Weng & Ors [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 HC ***(refd)***
Kerajaan Malaysia v. Dato' Hj Ghani Gilong [1995] 3 CLJ 161 FC ***(refd)***
Kerajaan Malaysia v. Jasanusa Sdn Bhd [1995] 2 CLJ 701 SC ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Leong Poh Shee v. Ng Kat Chong [1966] 1 MLJ 86 ***(refd)***
Lim Kok Liam & Sons Sdn Bhd v. Lau Choon Wan [1996] 4 CLJ 256 HC ***(refd)***
Malayan Banking Bhd v. Edaran Pit Stop Sdn Bhd & Ors [2000] 1 CLJ 234 HC ***(foll)***
Malayan Banking Bhd v. Mahmood Zuhdi Hj Mohd Noor [2001] 6 CLJ 171 HC ***(foll)***
Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***
Mohamed Mustafa v. Kandasami (No 2) [1979] 2 MLJ 126 ***(refd)***
Mokhtar Amin v. Omar Mat Ziki [1999] 1 CLJ 119 HC ***(dist)***
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***
Public Bank Bhd v. Rasatulin Holdings Sdn Bhd & Ors [1989] 1 MLJ 47 ***(dist)***
Rolland v. Hart [1870] Ch App 678 ***(refd)***
RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors [2001] 3 CLJ 661 HC ***(refd)***
See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors [1997] 2 CLJ 299 CA ***(refd)***
Serangoon Garden Estate Ltd v. Ang Keng [1953] 19 MLJ 116 ***(refd)***
Stuart v. Kingston [1923] 32 CLR 309 ***(refd)***
Syarikat Berpakat v. Lim Kai Kok [1983] 1 MLJ 406 ***(refd)***
Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (No 2) [1998] 3 CLJ 841 HC ***(refd)***
Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors [1999] 2 CLJ 51 HC ***(foll)***
Tropiland Sdn Bhd v. DCB Bank Bhd & Ors [2000] 1 CLJ 568 CA ***(refd)***
Wilson v. Church (No 2) [1879-1880] 12 Ch 454 ***(refd)***
Wong Hai Ong v. Banque National De Paris [2000] 6 CLJ 92 HC ***(refd)***
Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Husin & Anor [1996] 2 CLJ 353 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 73
Rules of the High Court 1980, O. 42 r. 13, O. 62 r. 13, O. 64 r. 1(1)

Other source(s) referred to:
Mallal's Digest of Malaysian and Singapore Case Law, 2001 Volume 2(1) on Civil Procedure, p 720 para 2016

For the plaintiff - Constance Ong Siew Ling; M/s Albar & Partners
For the 2nd defendant - Henry Quah Thiam Chai; M/s Haniff & Rajendran

Reported by Izzaty Izzuddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal filed by the second defendant against the decision of the learned registrar who on 29 August 2003 dismissed the appellant's ("the second defendant's") application in encl. (18) which sought to set aside or alternatively to stay execution of the judgment obtained by the respondent ("plaintiff) against the second defendant on 17 August 1998.

Factual Background

On 12 March 1998, the plaintiff filed a writ of summons and statement of claim against, *inter alia*, the second defendant who is the director of the first defendant and who executed all documents filed herein for the first defendant.

The second defendant through his former solicitors Messrs. Ashok, Puri, Hanafiah & Co. ("the former solicitors") filed an appearance on 20 April 1998 after service upon him of the writ of summons and the statement of claim.

On 15 July 1998, the plaintiff applied by way of summons in chambers for summary judgment against the second defendant who has filed neither a statement of defence or any affidavit in reply thereto. The plaintiff's application for summary judgment was fixed for hearing on 17 August 1998. As the second defendant and his former solicitors were not present on the day of hearing, summary judgment was entered against the second defendant.

A sealed copy of the order for summary judgment ("the order") was posted *via* AR registered post to the second defendant's former solicitors on 28 October 1998. The second defendant's application in encl. (18) was dismissed by the learned registrar on 29 August 2003. Hence, this appeal to me as judge in chambers.

Submissions By Counsel And Decision Of The Court

Time Frame For An Application To Set Aside Judgment

For brevity and convenience, a reference hereinafter to an order and rule is a reference to that order and rule in the Rules of the High Court 1980.

Cik Constance Ong Siew Ling, learned counsel for the plaintiff, relied on O. 42 r. 13 and contended that the second defendant's application in encl. (18) filed on 21 April 2002 is out of time because the order was sent by AR registered post to the second defendant's former solicitors on 28 October 1998.

It was stressed that the second defendant has offered no explanation for the delay.

Learned counsel for the second defendant, En. Henry Quah Thiam Chai, contended that O. 42 r. 13 does not apply as the summary judgment was defective and ought to be set aside *ex debito justitiae*, citing *Mokhtar Amin v. Omar Mat Ziki* [1999] 1 CLJ 119 in support of his contention.

He added that the plaintiff has failed to show that the order has been served on and received by the second defendant. He relied on *Public Bank Bhd v. Rasatulis Holdings Sdn Bhd & Ors* [1989] 1 MLJ 47; and urged the court to hear this appeal on its merits.

In this regard, I shall first consider the authorities cited for the second defendant.

In *Mokhtar Amin, supra*, there were at least two obviously cogent grounds for Augustine Paul J (now JCA) to hold that the judgment obtained by the plaintiff was defective as a result of which O. 42 r. 13 did not apply. Those two cogent grounds were:

(1) The plaintiff's summons for judgment did not state the particular rule of court which it sought to invoke, and so did not identify the nature of the judgment sought; and

(2) Assessment of damages was ordered in the absence of an order for damages which was clearly wrong in law and beyond curability.

None of the above grounds ever surfaced in the instant appeal.

In *Public Bank Bhd, supra*, cl. 8 of the guarantees executed by the fourth and the fifth defendants prescribed the service of the notice of demand either by personal service or by posting at the addresses mentioned in the guarantees. The plaintiff, instead of sending the notices by ordinary post, sent them by AR registered post. The AR cards were returned with the endorsements "Kembali tidak boleh dituntut" ("return unclaimed"). Siti Norma Yaakob J (now FCJ) upheld the fourth and fifth defendants' contention that there was no proper and effective service thereof.

It is clear to me that Her Ladyship was interpreting cl. 8 of the guarantees pertaining to the prescribed mode of service. The dictum there was not based on O. 42 r. 13, which is the crux of the contention before me.

The relevant portion of O. 42 r. 13 merits reproduction as follows:

> 13. Where in these rules provisions are made for the setting aside ... of any order or judgment, a party intending to set aside ... such order or judgment must make his application to the court within thirty days after the receipt of the order or judgment by him.

In my judgment, service of the order by AR registered post on the second defendant's former solicitors on 28 October 1998 is effective service of the order on the second defendant, as the former solicitors were at all material time the solicitors on record for the second defendant, and so constitutes 'the receipt of the order' by the second defendant under O. 42 r. 13.

Further O. 62 r. 13 provides that where a party, such as the second defendant herein, after having appeared in person, in this case, by filing a memorandum of appearance through his former solicitors and thus giving notice in writing to the opposite party such as the plaintiff or its solicitors that such former solicitors are authorised to act in the cause or matter on his behalf, all summonses orders and other documents which ought to be delivered to or served upon the second defendant as the party on whose behalf the notice is given shall hereafter be delivered to or served upon such solicitors.

In *Syarikat Perumahan Pegawai Kerajaan Sdn Bhd v. Sri Komakmur Sdn Bhd (No 2)* [1998] 3 CLJ 841, O. 62 r. 13 was considered by Kamalanathan Ratnam JC (now J) who held that once a defendant is represented by a firm of solicitors who have filed a memorandum of appearance with the court and had served a copy of same on the plaintiff's solicitors, it must stand until the said solicitors for the defendant discharge themselves or are themselves discharged by their client and such notice being given to the plaintiff, the firm of solicitors shall continue to remain as having conduct of the case.

A party such as the second defendant who is defended by a solicitor may change his solicitor but unless and until the notice of change of solicitor in Form 138 is filed in the registry, and served, the second defendant's former solicitors shall be considered as his solicitors until the final conclusion of the cause or matter in the High Court: O. 64 r. 1(1) and (2).

As the second defendant's former solicitors have not discharged themselves and have not been discharged by the second defendant, service of the order on 28 October 1998 on the former solicitors is deemed to be good service on the second defendant.

Further, the second defendant's former solicitors have not filed any affidavit to deny receipt of the order. That being the case, the plaintiff's affidavit of service stood uncontradicted and is hereby treated as an admission of the service: *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609.

In *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85, the Federal Court through the judgment of Gill CJ(M) (as he then was) enunciated the general rule that knowledge of a solicitor is the knowledge of the client, following the dictum of Lord Hatherley LC in *Rolland v. Hart* [1870] Ch App 678, 681 and *Stuart v. Kingston* [1923] 32 CLR 309 HC Australia.

In the application before the learned registrar and now this appeal before me, there is obviously a delay – indeed an inordinate delay – of some four years occasioned by the second defendant in making the application, because under O. 42 r. 13 it is mandatory for him to make the application after 30 days of the receipt of the order by him.

In *Khor Cheng Wah v. Sungai Way Leasing Sdn. Bhd.* [1997] 1 CLJ 396, Gopal Sri Ram JCA in delivering judgment for the Court of Appeal stated the cardinal principle of law that when a litigant, such as the second defendant, seeks the intervention of the court in a matter that affects his right, he must do so timeously and the burden is on the second defendant as the litigant who has delayed to render a satisfactory explanation for it.

In the instant application, apart from the alleged non-receipt of the order, the second defendant proffered no explanation whatsoever.

In *Pan Malayan Forwarding & Shipping Sdn Bhd v. Wing Teik Holding Bhd, Mallal's Digest of Malaysian and Singapore Case Law, 2001 Volume 2(1) on Civil Procedure* p. 720 para 2016, the defendant's application to set aside a default judgment was filed after a delay of 36 days from the receipt of the judgment by its solicitors. On the basis of, *inter alia*, O. 42 r. 13, I dismissed the application.

In *Ho Ming Chu (No. K/P: 62O822-06-5143) v. Leong Shee Wah (No. K/P: 4242935* [2001] 1 LNS 311, there was an unexplained delay of 16 days in the defendant's application made under O. 42 r. 13 to set aside a judgment in default of defence. I held that O. 42 r. 13 is mandatory and dismissed the defendant's application *in limine*.

Richard Malanjum J (now JCA) in *Tractors Malaysia (1982) Sdn Bhd v. Chiew Chong Huat & Ors* [1999] 2 CLJ 51 rejected a delay of some 15 months in making such an application, as it was not a reasonable ground.

A similar conclusion was reached by Suriyadi Halim Omar J in *Malayan Banking Bhd v. Mahmood Zuhdi Hj Mohd Noor* [2001] 6 CLJ 171, on the basis of the defendant's self-inflicted delay of six years as a result of unreasonable procrastination.

In the instant appeal, I am unable to find any plausible reason for the second defendant's four-year delay in making the application before the learned registrar. I am of the view that this appeal ought to be dismissed without further ado.

Be that as it may, I am prepared to proceed further and consider the instant appeal on its merits.

Is The Summary Judgment Regular?

Learned counsel for the second defendant submitted that service of the summons in chambers on the second defendant's former solicitors was defective as the acknowledgment of receipt card (AR card), purporting to prove service on the second defendant's former solicitors, did not bear any endorsement or acknowledgment of receipt, and that there was a breach of fundamental procedural law. He added that the summary judgment was irregular and should be set aside *ex debito justitiae.*

In support thereof, *Development & Commercial Bank Bhd v. Cheah Theam Swee* [1989] 2 CLJ 809; [1989] 1 CLJ (Rep) 474, *Hasil Bumi Perumahan Sdn Bhd & Ors v. United Malayan Banking Corp Bhd* [1994] 1 CLJ 329; and *Craig v. Kanssen* [1943] 1 KB 256 were cited.

The plaintiff's response is that the second defendant has through his former solicitors entered appearance after service of the writ on him and that further service of other processes of the court including the summons in chambers on his former solicitors would be valid service, as a result of which the summary judgment has been regularly obtained.

In my judgment, it is pertinent to note that in *Development & Commercial Bank, supra,* neither the defendant nor his counsel appeared at the hearing of the plaintiff's application for summary judgment under O. 14 which was hence entered for the plaintiff. Zakaria Yatim J (later FCJ) made it clear that the judgment was a regular judgment, which therefore provides the answer to the second defendant's aforesaid contention.

In *Hasil Bumi, supra,* the plaintiff served the writ and statement of claim on the solicitors for the defendant bank on 22 February 1991. Appearance was entered but no defence was filed on the due date. The plaintiff developer served on the bank's solicitors 48 hours notice requiring defence to be filed. The bank's

solicitors requested a further three weeks to file the defence but nevertheless filed the defence on 26 March 1991 and served it on the developer's solicitors on the same day. Three weeks later, on 19 April 1991, the registrar granted judgment in default against the bank but the judgment itself was dated 23 March 1991. The bank applied to set aside the judgment in default. In setting aside the judgment, the judge held, *inter alia*, that the judgment should have been dated after 19 April 1991, by which time a defence had already been filed and therefore the registrar should have rejected the application for default judgment. The judge's decision was upheld by the Supreme Court through the judgment of Jemuri Serjan CJ (Borneo) (as he then was).

The ground relied upon in *Hasil Bumi, supra,* has no semblance whatsoever with that of the second defendant herein.

In *Craig, supra,* the plaintiff on 18 January 1940 obtained an order to proceed with the enforcement of a judgment which he had obtained against the defendant on 12 January 1937. The order of 18 January 1940 was obtained on an affidavit of service on the defendant which stated that the deponent had served on the defendant a true copy of the summons asking for the order by posting it in a prepaid envelope addressed to the defendant at an address which was alleged to be that of the defendant's place of business and residence. The address stated was not the address for service given in the action, and the defendant was not residing or carrying on the businsess at the stated address and he never received the summons. The defendant's application to set aside the order was allowed by the master. The plaintiff appealed. Croom-Johnson J refused to entertain the argument that the defendant was entitled to have the order set aside *ex debito justitiae* as a nullity. The defendant appealed and the appeal was allowed by the Court of Appeal. The question before the Court of Appeal was whether the admitted failure to serve on the defendant the summons was a mere irregularity or whether it gave the defendant the right to have the order set aside. Lord Greene MR held that failure to serve process where service of process is required goes to the root of the proper procedure in litigation.

It is to be observed that the facts therein revealed an admitted failure of service, whereas the facts in the instant appeal as alluded to above are vastly different.

In the circumstances, I am of the view that the aforesaid cases cited for the second defendant are unsupportive of the second defendant's contention.

In *Amanah Merchant Bank Bhd v. Lim Tow Choon* [1994] 2 CLJ 1 SC, the defendant was sued under a guarantee following a default of the principal borrowers to whom the plaintiff bank had granted credit facilities. Plaintiff's solicitors had sent a notice by AR registered post to the last known address of the respondent, demanding payment of the amount owing. However, the AR

card was not returned. Although the defendant denied that the notice had been properly served, the Supreme Court held that once it was established that the notice of demand was sent through the post in an envelope addressed to the last known address of the defendant, cl. 17 of the guarantee applied as "it shall be deemed to be served on the day following that on which it was posted". The Supreme Court further held that it was not necessary for the plaintiff to show that the AR card had been duly returned and duly acknowledged for there to be effective service of the notice of demand.

The facts in the instant appeal are even stronger as the summons in chambers was sent to the second defendant's former solicitors who have not denied receiving it. Hence, a *fortiori*, I hold that the summons in chambers has been duly served on the second defendant's former solicitors and that such service constitutes receipt thereof by the second defendant under O. 62 r. 13 and O. 64 r. 1(1).

In the circumstances, I am of the view that summary judgment has been regularly obtained by the plaintiff against the second defendant.

Merits In Defence?

Alternatively, it was argued for the second defendant that, even if the summary judgment was regular, the second defendant has merits in his defence in that the plaintiff's claim for interest has been wrongfully imposed and computed by the plaintiff who has also failed to mitigate its own loss. In support of this submission, *Hasil Bumi, supra*, and *Fira Development Sdn Bhd v. Goldwin Sdn Bhd* [1989] 1 CLJ 1; [1989] 1 CLJ (Rep) 32 FC were cited.

The stand taken for the plaintiff is that the imposition and computation of interest was in line with the plaintiffs letter of offer and cl. 8(d) of the guarantee executed by the second defendant, and that the plaintiff has *vide* letter of demand dated 6 November 1997 informed the second defendant of the outstanding sum which has not been disputed by the second defendant.

On the issue of the plaintiff's duty to mitigate the loss, the plaintiff relied on the guarantee executed by the second defendant on 27 October 1996 and that the issue of mitigation of loss does not arise here.

On my part, it is demonstrably clear that the facts as found in the Federal Court judgments in *Hasil Bumi, supra*, and *Fira Development Sdn Bhd, supra*, did not revolve around the issue of an alleged wrongful imposition and computation of interest.

The basis of the plaintiff's claim herein is contractual in that the plaintiff's letter of offer dated 2 October 1996 and the charge instrument together with the annexure containing the terms of the credit facilities have been accepted by the first defendant wherein the second defendant is a director. The second defendant being the guarantor has the obligation to answer for the inability of or the default by the first defendant in making repayments under the credit facilities. See eg, *Malayan Banking Bhd v. Edaran Pit Stop Sdn Bhd & Ors* [2000] 1 CLJ 234 HC.

Further, cl. 22 of the charge document which provides for the certificate of indebtedness reads as follows:

> Certificate of Indebtedness
>
> 22. A certificate signed by any of your officers or agents as to the monies for the time being due or owing to you from the Borrower or any other person or party providing security to you as aforesaid or as to the liabilities of the Borrower or such other person or party or any account settled or stated by or between you and the Borrower or such other person or party or admitted by the Borrower or such other person or party or on his/its/their behalf shall be binding upon the Guarantor and shall be accepted by the Guarantor as conclusive evidence against the Guarantor that the amount appearing thereon is due or owing to you from the Borrower or such other person or party.

The above express provision on the certificate of indebtedness is also contained in cl. 22 of the guarantee executed by the second defendant.

That certificate of indebtedness has been filed as an essential and integral part of the plaintiff's application for summary judgment, to which there has been no response from and no dispute by the second defendant. It is trite law that the certificate of indebtedness shall be accepted as final and conclusive: *Citibank N.A. v. Ooi Boon Leong & Ors*. [1981] 1 MLJ 282.

As regards the plaintiff's duty to mitigate the loss, the short answer is to be found in cl. 17 of the guarantee in the following words:

> You are at liberty but are not bound to resort for your own benefit or otherwise to any other means of payment at any time and in any order think fit without thereby diminishing the liability of the Guarantor hereunder and you may enforce this instrument and your rights and remedies hereunder either for the payment of the ultimate balance after resorting to other means of payment or for the balance due at any time notwithstanding that other means of payment have not been resorted to and in latter case without entitling the Guarantor to any benefit from such other means of payments so long any monies remain

due or owing from Borrower to you and in addition you shall be at liberty to require payment by the Guarantor of any monies due or owing to you without taking proceedings first to enforce such payment by the Borrower or any other person or party.

It is clear that the right to sue the guarantor without resorting to the securities is clearly recognised: per Lee Hun Hoe CJ (Borneo) in *Bank Bumiputra Malaysia Bhd v. Esah binti Abdul Ghani* [1985] 2 CLJ 409; [1985] CLJ (Rep) 41, following the judgments of Lord Selbone and Lord Blackburn in the Scottish case of *Ewart v. Latta* [1865] 4 Macq. 983, 987.

A similar sentiment was expressed by Edgar Joseph Jr J (later FCJ) in *Malaysia Building Society Bhd v. Lim Kheng Kim & Ors* [1988] 3 MLJ 175.

In my view, the so-called defence is devoid of merits.

Stay Of Execution

Counsel for the second defendant did not put forward any submission in support of the application for stay of execution.

For the plaintiff, it was argued that the second defendant has failed to show any special circumstance.

Under s. 73 of the Courts of Judicature Act 1964, an appeal does not operate as a stay of execution: *Wu Shu Chen (Sole Executrix of the estate of Goh Keng How, deceased) v. Raja Zainal Abidin bin Raja Husin & Anor.* [1996] 2 CLJ 353.

The grant or refusal of a stay of execution of judgment is essentially an exercise of discretion by the court, based on established judicial principles eg,:

(1) the existence of special circumstances: *Serangoon Garden Estate Ltd. v. Ang Keng* [1953] 19 MLJ 116 per Brown, J; *Che Wan Development Sdn Bhd v. Co-operative Central Bank Bhd* [1989] 2 CLJ 584; [1989] 1 CLJ (Rep) 366 per NH Chan, J (later JCA); *Leong Poh Shee v. Ng Kat Chong* [1966] 1 MLJ 86 per Raja Azlan Shah, J (now HRH Sultan of Perak); *Wong Hai Ong v. Banque National De Paris* [2000] 6 CLJ 92; 94 per Muhammad Kamil Awang J (as he then was); *Syarikat Berpakat v. Lim Kai Kok* [1983] 1 MLJ 406, 407 per Hashim Yeop A Sani J (later CJ (Malaya); *Hong Leong Finance Bhd. v. Hon Hoi Weng & Ors.* [1987] 2 CLJ 227; [1987] CLJ (Rep) 656 per VC George J (later JCA); *Kerajaan Malaysia v. Jasanusa Sdn Bhd* [1995] 2 CLJ 701 SC; *Kerajaan Malaysia v. Dato' Hj Ghani Gilong* [1995] 3 CLJ 161 FC; *Tropiland Sdn Bhd v. DCB Bank Bhd & 2 Ors* [2000] 1 CLJ 568; *All persons in Occupation*

of the House and the Wooden Stores Erected on a Portion of Land Held Under Grant No. 26977 for Lot 4271 in the Township Of Johore Bahru, Johor v. Punca Klasik Sdn Bhd [1998] 5 CLJ 49 per Abdul Malik Ishak, J; *Lim Kok Liam & Sons Sdn. Bhd. v. Lau Choon Wan (Leong Yok Chin Intervener)* [1996] 4 CLJ 256 per Abdul Wahab Patail, J; *RHB Bank Bhd v. FGG Wood Mouldings Industries Sdn Bhd & Ors* [2001] 3 CLJ 661 per Kang Hwee Gee, J;

(2) the appeal, if successful, is not nugatory: *See Teow Guan & Ors v. Kian Joo Holdings Sdn Bhd & Ors* [1997] 2 CLJ 299 CA; *Wilson v. Church (No. 2)* [1879-1880] 12 Ch. 454 CA; *Mohamed Mustafa v. Kandasami (No. 2)* [1979] 2 MLJ 126, 127 per Abdul Hamid J (later LP); *RHB Bank Bhd, supra;*

(3) the court will not deprive a successful party of the fruits of his litigation: *Serangoon Garden, supra, Syarikat Berpakat, supra; Punca Klasik, supra; Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd* [2002] 3 CLJ 380.

Upon an anxious consideration of the second defendant's appeal against the learned registrar's dismissal of the application for stay of execution, I am unable to find any error in the exercise of his discretion.

In this appeal, I am unable to see any ground or circumstance whatsoever, less so any special ground or circumstance, in order to enable me to exercise the discretion in favour of the second defendant.

Conclusion

On the foregoing grounds, I hold that the entire decision of the learned registrar is correct and is hereby affirmed. The instant appeal is wholly without merits and is dismissed with costs.